IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	CIVIL DIVISION
Plaintiff,	)	
vs.	)	C.A. No. 00-2041
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual,	)	Judge William L. Standish
Defendants	)	

PLAINTIFF'S RESPONSE TO DEFENDANT HERKLOTZ'S MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. §1404(a)

AND NOW comes Plaintiff, WRS, Inc. d/b/a WRS Motion Picture Laboratories (hereinafter referred to as "WRS"), by and through its counsel, Thomas E. Reilly, P.C., with the following Response to the Motion to Transfer Venue Pursuant to 28 U.S.C. §1404(a):

I. MOTION TO DISMISS HERKLOTZ'S MOTION TO TRANSFER VENUE FOR FAILING TO STATE A FACTUAL BASIS SUFFICIENT TO SUPPORT THE REQUESTED RELIEF

1. Herklotz is the party moving to transfer the case pursuant to 28 U.S.C. §1404(a). The burden of establishing that the existing forum is inconvenient is the movants. In re: Amendt, 169 Fed. Appx. 93 2006 U.S. App. LEXIS 3944 (3rd Cir. 2006).

2. Defendant Herklotz's Motion to Transfer Venue asked the Court to transfer the case because Herklotz's declining ability to travel, thus attend trial in

Pittsburgh. Defendants, Plaza Entertainment, Inc., Erik Parkinson, and Charles von Bernuth, do not reside in Pennsylvania and two proposed witnesses, Neil Carrey, Esquire and Thomas Gehring, Esquire (are beyond the Subpoena power of the Court).

3. On July 21, 2006, at Docket No. 104, the Court entered Judgment in favor of WRS and against Defendant, Herklotz, on liability, as a result of which the only remaining issue before the Court is the damages to which WRS is entitled.

4. In order for Herklotz, as Movant on the Motion to Transfer to satisfy the burden under 28 U.S.C. §1404(a), it was incumbent upon Defendant, Herklotz, to establish that the testimony of the proposed witnesses (including Herklotz) will be relevant to and material to the remaining issue of damages pending in the case.

5. Herklotz's Motion does not state a purpose for which he or the other proposed witnesses will be called to testify with respect to the remaining issue of damages.

6. With respect to the non-party witnesses, Neil Carrey, Esquire and Thomas Gehring, Esquire, Herklotz was required to state a factual basis for concluding that the witnesses' testimony would be relevant and material to the remaining issue of damages in the case. Furthermore, it was incumbent upon Herklotz to demonstrate that each of these witnesses was unwilling to come to trial and has not supported that assertion with the Affidavits of the witnesses attesting to their unwillingness to come to trial.

7. Furthermore, Herklotz's reliance upon F.R.C.P. 45(c)(A)(ii) is misplaced with respect to Defendants, Plaza Entertainment, Inc., Erik Parkinson and Charles von Bernuth. The cited rule entitles non-party persons, who have been subpoenaed to attend a trial more than 100 miles from their residence, to have the subpoena quashed. The rule

specifically does not apply to persons who are parties or persons who are officers of a party. In this case, Erik Parkinson and Charles von Bernuth are both parties and officers of Plaza Entertainment, Inc. and could be compelled by the Court to appear to testify.

8. Where a non-witnesses testimony would be relevant and material to a cause of action and it is demonstrated that witness is unwilling to attend, movant must also establish that deposition testimony would be inadequate. Scheidt v. Klein, 956 Fed. 2d 963 (10th Cir. 1992). Here, as Herklotz's Motion points out, this case was commenced in October of the year 2000. At no time did Herklotz take the deposition of Neil Carrey, Esquire, Thomas Gehring, Esquire or, for that matter, Erik Parkinson and Charles von Bernuth.

9. As pointed out in Herklotz's Motion, none of these individuals have come to Pennsylvania to the best of his knowledge. Accordingly, Herklotz had adequate notice of his need to depose them for the potential use at trial if they were beyond a subpoena power of the Court. Having not taken said depositions, WRS submits Herklotz cannot establish why their testimony could not be presented by deposition.

WHEREFORE, for the reasons set forth above, WRS, Inc. d/b/a WRS Motion Picture Laboratories, respectfully submits that the Motion to Transfer Venue Pursuant to 28 U.S.C. §1404 should be dismissed for failure to state a sufficient basis for the Court to entertain the Motion.

II. FACTS

1. Admitted.

2. Admitted in part. Denied in part. WRS admits that Herklotz came to Pittsburgh for the settlement conference in March of 2006 and has visited Pittsburgh on at

least four other occasions to attend meetings with Schneider Downes, Inc. WRS does not have sufficient information regarding the remaining averments contained in Paragraph 2 to form a belief as to their truth. Said averments are therefore denied.

3. Admitted in part. Denied in part. WRS admits the averments contained in Paragraph 3 to the extent that they allege that Defendants, Erik Parkinson, Charles von Bernuth and Plaza Entertainment, Inc., are not located in the Western District of Pennsylvania. WRS is without sufficient information to form a belief as to the truth of the remaining averments contained in Paragraph 3 and, in particular, the suggested implication that neither Parkinson, nor von Bernuth, would travel to Pittsburgh to attend a trial. Said averments are, therefore, denied. Furthermore, as pointed out above, Herklotz has failed to aver any basis to establish that Parkinson or von Bernuth would provide relevant and material evidence on the issue of damages, the only issue remaining in the case.

4. Admitted in part. Denied in part. To the best of the information of WRS, WRS admits that neither Neil Carrey, Esquire or Thomas Gehring, Esquire reside outside the Western District of Pennsylvania. After reasonable investigation, WRS is unable to form a belief as to the remaining averments contained in Paragraph 4. Said averments are, therefore, denied. To the extent that Herklotz intends to call the identified individuals as witnesses, Herklotz has failed to allege a factual basis to establish that they are not willing to come to testify in the Western District and, further, has failed to state any factual basis to establish that the testimony that they would be called to give is relevant and material to the issue of damages, which is the only issue remaining in the

case. Finally, Herklotz has failed to allege why he has failed to depose these individuals during the six plus years that this case has been pending.

III. CHANGE OF VENUE PURSUANT TO TITLE 28 U.S.C. §1404(a)

5. Paragraph 5 is a conclusion of law to which no response is required. To the extent that a response is required, WRS incorporates its Motion to Dismiss in substance as if fully set forth.

6. Paragraph 6 is a conclusion of law to which no response is required. To the extent that a response is required, WRS incorporates its Motion to Dismiss in substance as if fully set forth.

7. Paragraph 7 is a conclusion of law to which no response is required. To the extent that a response is required, WRS incorporates its Motion to Dismiss in substance as if fully set forth.

8. Paragraph 8 is a conclusion of law to which no response is required. To the extent that a response is required, WRS incorporates its Motion to Dismiss in substance as if fully set forth.

A. FACTORS

9. Admitted in part. Denied in part. To the extent that the averments contained in Paragraph 9 aver facts regarding the components to be evaluated by the Court if the Court were to consider Herklotz's Motion, said statement is admitted. To the extent that the averments are intended to suggest or imply that Herklotz's Motion has satisfied the elements required before the Court can consider the Motion, said averment is denied. Rather, WRS incorporates its Motion to Dismiss as if fully set forth. Furthermore, WRS submits that in conjunction with this Motion, it has filed a Motion for

Summary Judgment as to the issue of damages, pointing out that there is no genuine issue of material fact remaining for the Court to decide. Therefore, WRS respectfully submits that there is no genuine issue of material fact and that trial is unnecessary.

10. Denied. The averments contained in Paragraph 10 are denied. Rather, after reasonable investigation, WRS is unable to form a belief as to the truth of the averments contained in the Motion regarding the health of Mr. Herklotz. With regard to the availability of witnesses, WRS specifically denies that any of the witnesses identified by Herklotz have testimony that is relevant and material to any issue of fact remaining in the case. Rather, based upon the Motion for Summary Judgment filed in conjunction with this Response, WRS respectfully submits that there is no genuine issue of material fact remaining as to the issue of damages and that WRS is entitled to Judgment as a matter of law. Accordingly, trial is not necessary. Furthermore, Herklotz has failed to attach Affidavits of the proposed witnesses attesting to their unwillingness to appear and testify in the event of trial and has failed to indicate in any manner the factual basis upon which the Court could evaluate how the testimony of the proposed witnesses would be material or relevant to any remaining issues in the case. Because there exists no genuine issue of material fact and because Herklotz has failed to meet its burden as required under 28 U.S.C. §1404, WRS respectfully submits that the issue of Herklotz's ability to travel is irrelevant since there is no need for a trial and Judgment should be entered in favor of WRS on the issue of damages on the Motion filed in conjunction herewith.

11. Denied. The averments contained in Paragraph 11 are specifically denied. Rather, WRS incorporates by reference hereto its response to Paragraph 10 and its Motion to dismiss and submits that the Court should dismiss the Motion to Transfer

pursuant to 28 U.S.C. §1404 and enter Judgment pursuant to the Motion for Summary Judgment as to damages filed in conjunction herewith.

III. CONCLUSION

In conclusion, WRS, Inc. d/b/a WRS Motion Picture Laboratories respectfully submits to the Court that the Motion filed by Defendant Herklotz to transfer venue pursuant to 28 U.S.C. §1404(a) should be dismissed for failure to set forth sufficient information for the Court to consider the Motion or, in the alternative, that the Motion should be denied since Plaintiff's choice of venue was appropriate and Defendant has failed to assert any basis upon which the Court should change or transfer venue.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: ___/s/ Thomas E. Reilly____

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Defendants.

CIVIL ACTION

No. 00-2041

CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of the Plaintiff's Response to Defendant Herklotz's Motion to Transfer venue was delivered via first-class mail, postage pre-paid on the _13th__ day of October, 2006 to the following:

Eric Parkinson, individually and
As President of Plaza Entertainment, Inc.
4929 Wilshire Boulevard
Suite 830
Los Angeles, CA 90010

John W. Gibson, Esquire
Greenfield Court
1035 Fifth Avenue
Pittsburgh, PA 15219

John P. Sieminski, Esquire
Burns, White & Hickton
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212

THOMAS E. REILLY, P.C.

BY: /s/ Thomas E. Reilly
Thomas E. Reilly, Esquire
Attorney for Plaintiff, WRS, Inc.